No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORP.,

Petitioner,

v.

TROY LAMBERT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

JOHN C. HUESTON
Counsel of Record
STEVEN N. FELDMAN
JOE A. REITER
HUESTON HENNIGAN LLP
523 West 6th Street, Suite 400
Los Angeles, CA 90014
(213) 788-4340
jhueston@hueston.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

In an attempt to avoid this Court's review, Respondent Troy Lambert understates the importance of the Ninth Circuit's erroneous decision – as well as the significant circuit split it created – and instead advances arguments regarding the timeliness of his petition under Federal Rule of Civil Procedure 23(f) that were already correctly rejected below.

Contrary to Lambert's arguments, the Question Presented presents issues far more important than the parties' instant dispute; in fact, *all* of the key factors this Court usually considers in deciding whether to grant certiorari are present. *See* Sup. Ct. R. 10(a), (c).

First, the decision below conflicts with at least seven other U.S. Circuit Courts of Appeal (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh). Those courts have all held that Rule 23(f) is strict and mandatory. None have applied equitable tolling and instead recognize only one narrow exception Lambert did not meet: a motion for reconsideration filed *before* Rule 23(f)'s 14-day deadline expires.

Lambert claims there is no circuit split because he filed a motion for reconsideration within Federal Rule of Civil Procedure 59(e)'s 28-day deadline while litigants in the other circuits' cases did not. But whether Lambert or the other litigants complied with Rule 59(e) is irrelevant here. Op. at 21–24. What matters is whether a motion for reconsideration was filed before the applicable *appeal* deadline in Rule 23(f) expired. *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within ten

days if it is going to toll the ten-day period[1] within which to seek permission to appeal."); *United States v. Healy*, 376 U.S. 75, 77–78 (1964) (A "timely petition for rehearing . . . filed within the permissible time for appeal" tolls the appeal deadline.). Because Lambert and the other litigants did not file motions for reconsideration before the applicable appeal deadline, their subsequently filed Rule 23(f) petitions were untimely.

Second, this case involves an important and frequently occurring issue of federal law that this Court has not had the opportunity to address. *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13, 18 n.3 (2017) ("We have reserved whether mandatory claim-processing rules may be subject to equitable exceptions."). The Ninth Circuit decided that exact issue, broadly holding that all claim-processing rules are subject to equitable exceptions. That ruling – now governing law in the busiest and largest circuit in the country – has profound consequences both in and outside the class action context.

Third, the decision below conflicts with this Court's precedent. This Court has held and reaffirmed that claim-processing rules are "unalterable" and "mandatory" where, as here, a party has properly raised them. *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017); *see also Eberhart v. United States*, 546 U.S. 12, 19 (2005).

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[1] Prior to December 1, 2009, Rule 23(f) provided for a filing period of ten days rather than fourteen.

Lambert argues that this Court's decisions in *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384 (1964), *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 372 U.S. 215 (1962), and other cases did apply equitable exceptions to appeal deadlines. However, these cases were overruled by *Bowles v. Russel*, 551 U.S. 205, 214 (2007). To the extent Lambert believes the cases still govern with respect to non-jurisdictional deadlines, he is equally mistaken. If that were true, this Court would not have made clear just last year that it has "reserved" that issue. *Hamer*, 138 S. Ct. at 18 n.3.

Attempting to dodge these issues, Lambert ignores the Ninth Circuit's reasoning and argues that the court did not need to apply equitable exceptions because he purportedly tolled Rule 23(f)'s 14-day deadline by filing a motion for reconsideration before Rule 59(e)'s 28-day deadline expired. Op. at 9. As noted above, however, Rule 23(f)'s shorter 14-day deadline is what governs – not Rule 59(e). Because Lambert's motion for reconsideration was filed more than 14 days after the District Court's order, it could not have tolled the 14-day appeal deadline in Rule 23(f). The Ninth Circuit correctly reached that conclusion below. *Lambert v. Nutraceutical*, 870 F.3d 1170, 1178 (9th Cir. 2017).

The Ninth Circuit also correctly rejected Lambert's erroneous arguments that (1) he made an oral motion at a March 2, 2015 status conference and (2) the District Court's order on his motion for reconsideration opened a new filing window under Rule 23(f). That is why the Ninth Circuit had to apply broad equitable

tolling in order to excuse the untimeliness of Lambert's Rule 23(f) petition.

Lambert also argues that Nutraceutical waived the Question Presented by not objecting in District Court to the timing of his motion for reconsideration. But Nutraceutical had no reason or obligation to object because it did not know that Lambert would file a subsequent Rule 23(f) petition. Lambert never disclosed his Rule 23(f) petition before it was filed, including at the March 2, 2015 status conference when he sought leave to file a motion for reconsideration. Appendix 68–77. Nutraceutical also did not waive its rights during Ninth Circuit oral argument as Lambert mistakenly claims.

In short, the Ninth Circuit's decision created a circuit split, presents an important question of federal law that this Court has not yet decided, violates Fed. R. App. P. 26(b), contravenes the very purpose behind Rule 23(f)'s short and mandatory deadline, and is inconsistent with this Court's precedent. The petition should be granted.

ARGUMENT

I. LAMBERT'S APPEAL WAS LATE

The Ninth Circuit applied equitable tolling because Lambert's Rule 23(f) petition was late. *Lambert*, 870 F.3d at 1176 ("[U]nless an exception applies, Lambert's Rule 23(f) petition would be barred."). Ignoring that holding, Lambert argues that his appeal was timely and there is "no need to consider any equitable exceptions." Op. at 7. He is mistaken.

A. Lambert Did Not Make an Oral Motion

Lambert claims he made an *oral* motion for reconsideration at a March 2, 2015 status conference. Op. at 8. The transcript shows otherwise. Lambert actually asked for "leave to file a renewed motion for class certification." Appendix at 71. The District Court rejected Lambert's request, but acknowledged his right to file a motion for reconsideration. Thereafter, Lambert filed a written motion. In short, neither the District Court, Lambert, or Nutraceutical thought that an oral motion had been made.

B. Rule 59(e) is Irrelevant

Lambert's second argument is that he filed a motion for reconsideration within Rule 59(e)'s 28-day deadline. Op. at 9. Even if that were true, it does not make his Rule 23(f) petition timely. The only way a motion for reconsideration can toll Rule 23(f)'s deadline is if it is filed before the 14-day deadline in Rule 23(f) expires. *McNamara*, 410 F.3d at 281; *Gary v. Sheahan*, 188 F.3d 891, 892 (7th Cir. 1999) ("[I]f the request for reconsideration is filed more than [14] days after the order . . . appeal must wait until the final judgment."); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) (same). That is why the Ninth Circuit had to apply equitable tolling. *Lambert*, 870 F.3d at 1178.

While Lambert cites this Court's opinions in *United States v. Ibarra*, 502 U.S. 1 (1991), *United States v. Dieter*, 429 U.S. 6 (1976), and *Healy*, 376 U.S. at 75, those decisions do not support his argument. Unlike Lambert, the appellants filed motions for reconsideration *before* the applicable appeal deadline expired. *Healy*, 376 U.S. at 77–78 (A "*timely* petition

for rehearing by the Government filed *within the permissible time for appeal* renders the judgment not final for purposes of appeal until the Court disposes of the petition." (emphasis added)); *see also Ibarra*, 502 U.S. at 5 (motion filed *before* 30-day appeal deadline in Fed. R. App. 4(b) had expired); *Dieter*, 429 U.S. at 7 (same).

This Court's precedent is therefore consistent with the rule that a motion for reconsideration must be filed before Rule 23(f)'s 14-day deadline expires in order to toll that deadline.

C. The District Court Did Not Restart the Rule 23(f) Deadline

Lambert's third argument is that the District Court's order on his motion for reconsideration reset Rule 23(f)'s deadline. Again, the Ninth Circuit did not adopt this argument. *Lambert*, 870 F.3d at 1181 n.8.

Nor is Lambert correct. "An order that leaves class-action status unchanged from what was determined by a prior order is not an order granting or denying class action certification," and thus does not trigger a new Rule 23(f) deadline. *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191–92 (10th Cir. 2006); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193 (3d Cir. 2008); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291–92 (11th Cir. 2007); *Nucor Corp.*, 760 F.3d at 343; *In re DC Water and Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009).

Because the District Court's order did not recertify the class and instead "maintain[ed] the status quo," the order did not restart the Rule 23(f) deadline.

II. THERE IS AN ACKNOWLEDGED SPLIT OF AUTHORITY

Lambert argues that "this case does not implicate any circuit conflict," Op. at 21, even though the Ninth Circuit expressly "recognize[d] that other circuits would likely not toll the Rule 23(f) deadline in Lambert's case." *Lambert*, 870 F.3d at 1179.

In fact, every other U.S. Circuit Court of Appeal to consider this issue – the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh – has held that the Rule 23(f) deadline is "strict and mandatory" because its purpose is to reduce the inherent disruption caused by interlocutory appeals. *See Gutierrez*, 523 F.3d at 192 (collecting cases). None of the other circuits have applied equitable tolling or otherwise excused a party's failure to file a Rule 23(f) petition or motion for reconsideration within the 14-day deadline.

Moreover, the Third, Tenth, and Eleventh Circuits have rejected untimely Rule 23(f) petitions in situations that closely resemble the facts before the Ninth Circuit. *See id.* at 190–91, 198 (Rule 23(f) "is clearly a strict and inflexible time limit" that cannot excuse a petitioner's mistaken reliance on a district court's scheduling order.); *see also Jenkins*, 491 F.3d at 1289–92 (rejecting untimely Rule 23(f) petition even though, in light of petitioners' excusable neglect, the district court vacated its order to restart Rule 23(f)'s deadline); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004).

Lambert believes his case is distinguishable because he filed a motion for reconsideration within the 28-day deadline in Rule 59(e), however, as explained above,

whether Lambert complied with Rule 59(e) is irrelevant. Rather, what matters is whether the motion for reconsideration was filed before the shorter 14-day deadline in Rule 23(f) expired. For that reason, the other circuits would have rejected the Rule 23(f) petitions at issue *even if* the petitioners had complied with Rule 59(e).

III. THE DECISION BELOW VIOLATES FED. R. APP. P. 26

As explained in the petition, the Ninth Circuit violated Fed. R. App. P. 26(b)(1)'s express prohibition against "extend[ing] the time to file . . . a petition for permission to appeal." *See Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (rejecting untimely Rule 23(f) petition; holding "this Court is expressly barred from extending the time to file a petition for permission to appeal"); *Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013) (same); *Delta Airlines*, 383 F.3d at 1145.

In response, Lambert argues that "the district court simply gave Lambert a six-day extension of time" to file a motion for reconsideration and "[n]othing in the Federal Rules prohibits a court from extending the time to file a motion for reconsideration." Op. at 14. Again, Lambert misses the point. Even assuming courts can extend the time to file a motion for reconsideration, such an extension does not affect the *separate* deadline governing Rule 23(f) petitions. *Gutierrez*, 523 F.3d at 194 n.6 ("[W]hile the District Court has the power to control its docket and was well within its authority to extend the time for Petitioners to file their Motion to Reconsider, it did not have the

authority to extend the time to file a Rule 23(f) petition.").

IV. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S PRECEDENT

Lambert cites *Thompson*, 375 U.S. at 387, *Harris Truck Lines*, 371 U.S. at 217, and other cases where this Court has applied equitable tolling. Op. at 25–26. Lambert admits that these cases were overruled by *Bowles*, 551 U.S. at 214, yet he argues they are good law with respect to non-jurisdictional deadlines. *Id.*

Lambert ignores this Court's more recent decisions. As those cases made clear, this Court has "reserved whether mandatory claim-processing rules may be subject to equitable exceptions." *Hamer*, 138 S. Ct. at 18 n.3; *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004).

Moreover, this Court's decisions in *Eberhart* and *Manrique* suggest that equitable tolling cannot apply to all claim-processing rules. *Eberhart* held that claim-processing rules are "unalterable on a party's application." *Eberhart*, 546 U.S. at 15 (citations omitted). The Court reaffirmed that rule in *Manrique* when it held that a court's "duty to dismiss" an untimely appeal of an amended judgment was "mandatory" if the opposing party objected. *Manrique*, 137 S. Ct. at 1271–72.

Lambert's attempt to distinguish these cases is unconvincing. He argues that neither "*Manrique* or *Eberhart* ha[d] occasion to address the applicability of equitable exceptions." Op. at 30. Yet, *Eberhart* did just that when addressing *United States v. Robinson*, 361 U.S. 220 (1960). In *Robinson*, this Court reversed

the Seventh Circuit's ruling that an "excusable neglect" exception applied to untimely notices of appeal. *Eberhart*, 546 U.S. at 17. As *Eberhart* explained, "*Robinson* is correct not because the District Court lacked subject-matter jurisdiction, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Id.* (emphasis added).

Lambert also argues that this Court has a "longstanding recognition that cases should not turn on technicalities in the notice-of-appeal context." Op. at 28. But this case does not involve technical pleading violations like the cases Lambert cites. This case involves a party's failure to comply with a strict deadline designed to reduce the disruption caused by interlocutory appeals. Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment).

While Lambert argues that cases should be decided on the merits, there also exists a strong public policy, as reflected in Rule 23(f) itself, against time-consuming and expensive interlocutory appeals. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) ("[T]he drafters intended interlocutory appeal to be the exception rather than the rule.").[2]

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[2] Lambert also argues that reversal of the Ninth Circuit will not affect this case because the District Court will recertify the class. Op. at 20. As noted above, this case presents more important issues than the parties' dispute. In any event, Lambert's argument is pure speculation. Certification is inappropriate for numerous reasons the District Court has not yet addressed.

V. NUTRACEUTICAL DID NOT WAIVE OR FORFEIT THE QUESTION PRESENTED

Lambert argues that Nutraceutical did not object to the timeliness of his motion for reconsideration in its opposition or when the District Court set a briefing schedule at the March 2, 2015 status conference. At that time, however, Nutraceutical *did not even know* that Lambert intended to file a Rule 23(f) petition. Lambert never mentioned his Rule 23(f) petition during the status conference or any other time before it was filed. Appendix 68–77. Without knowing that Lambert would file a Rule 23(f) petition, Nutraceutical could not possibly have waived any objection. *Hamer*, 138 S. Ct. at 17 n.1 ("[W]aiver is the intentional relinquishment or abandonment of a known right." (citations omitted).)

Lambert's theory that Nutraceutical waived its rights during Ninth Circuit oral argument also fails. As this Court has stated, "we are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972); *see also Robb v. Bethel Sch. Dist. 403*, 308 F.3d 1047, 1054 (9th Cir. 2002) ("We are not inclined to infer a waiver from oral argument lightly."), *overruled on other grounds by* 653 F.3d 863 (9th Cir. 2011). Here, Nutraceutical's counsel merely responded to a hypothetical question from the bench and was interrupted by another judge before he could explain that this is an unsettled issue of law. Oral Argument at 23:40–24:30, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15–56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181. That brief and

incomplete exchange is hardly the sort of deliberate, clear, and unambiguous statement required to show an intentional waiver of the Question Presented. *See MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997) ("In order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous.").

In addition, as Lambert acknowledges, Nutraceutical's response referenced the unique circumstances doctrine – a doctrine that is not even at issue here, as it only applies if a court, unlike here, makes a "specific assurance" that an appeal can be initiated at a later date. 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1168 (4th ed.); Appendix 68–77. Moreover, the Ninth Circuit did not apply the unique circumstances doctrine here, instead issuing a far broader holding that all claim-processing rules are subject to equitable tolling. *Lambert*, 870 F.3d at 1177 n.2.

CONCLUSION

In sum, this case presents all of the key factors this Court usually considers in deciding whether to grant certiorari: a recognized circuit split; an important issue of federal law this Court has not had the opportunity to address; and a decision inconsistent with this Court's precedent (and the federal rules it promulgates). Sup. Ct. R. 10(a), (c). This case is therefore the appropriate vehicle for this Court to address the Question Presented.

Respectfully submitted,

HUESTON HENNIGAN LLP
JOHN C. HUESTON
Counsel of Record
STEVEN N. FELDMAN
JOE A. REITER
523 West 6th Street, Suite 400
Los Angeles, CA 90014
213.788.4340
Jhueston@hueston.com

Counsel for Petitioner